Supreme Court, U.S.
FILED
JUN 9 1992
OFFICE OF THE CLERK

(3)

No. 91-1596

In The

Supreme Court of the United States

October Term, 1991

REUBEN STURMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER 18 U.S.C. § 3505 VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT BECAUSE IT PERMITS AN ACCUSED TO BE TRIED ON THE BASIS OF *EX PARTE* AFFIDAVITS.

The government defends its use of *ex parte* affidavits to lay the foundation for admitting foreign business records into evidence on the apparent ground that the Confrontation Clause simply does not apply to foundation evidence that must be elicited before other evidence may be admitted at trial. Gov't Br. at 23-24. Such a proposition, however, finds no support in the language of the Sixth Amendment itself, which provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . *to be confronted with the witnesses against him.* . . . " (Emphasis added). There can be no doubt that the affiants in this case were witnesses against the accused, indeed critical witnesses, for without their testimony the records upon which petitioner's entire prosecution was based could never have been admitted into evidence. There can further be no doubt, as conceded by the government, that the affidavits at issue were collected by the prosecution in anticipation of trial on an *ex parte* basis – the precise evil which, at its core, the Confrontation Clause was designed to prevent. *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736, 740-41 (1992). The government's proposition, therefore, can find no support in the policy underlying the Sixth Amendment right to confront witnesses either.[1] Thus, the suggestion

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[1] Nor does the government's proposition find any support in Rule 104(a), Fed. R. Evid., which could not, and has never been interpreted to abrogate a defendant's constitutional right to confront witnesses against him. The government's citation to *United States v. Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987), seemingly in support of its proposition that confrontation of foundation witnesses is not required, is puzzling. The court's holding in *Tedder* was merely that the defendant there had waived any objections he might have had to the admission of records under § 3505. *Tedder* did not even mention the Confrontation Clause or Rule 104(a).

that the Confrontation Clause does not apply to those parts of a federal criminal felony trial where critical, essential foundation testimony is elicited is untenable.

Equally without merit is the government's argument that the procedures of § 3505 do not run afoul of the Sixth Amendment because the business records exception to the hearsay rule is "firmly rooted" and among the safest of the hearsay exceptions. This case is simply not a challenge to that rule. Rather, the question presented here is whether Congress can enact legislation exempting one class of witnesses from testifying in open court and from being subjected to cross-examination. The class of witnesses exempted from testifying in open court under § 3505 happens to be those who would provide foundation testimony for the admission of business records. That happenstance, however, does not bring into question the legitimacy of the exception to the hearsay rule for business records any more than a law allowing affidavits, instead of live testimony, to identify and lay the foundation for admitting into evidence the weapon used in a murder or an eyewitness identification would raise questions about the constitutional efficacy of admitting murder weapons or eyewitness identifications into evidence at criminal trials.

Nor is there any merit to the implication of the government's entire argument that face-to-face confrontation would be of no value in this case because the testimony merely related to the foundation for business records. On the contrary, confrontation of these important witnesses, as with any other witnesses in any other context, serves a vital role. First, cross-examination would give a defendant the opportunity to raise serious questions about the identity, creation, maintenance, authenticity or trustworthiness of the business records at issue, and, of equal importance, may well shed important light on the meaning and significance of the contents of the records and the transactions allegedly reflected by them. An effective cross-examination could lead to the outright exclusion of the records sought to be admitted. Failing that, an effective cross-examination could lead the jury to reduce the

weight it ultimately gives to either the foundation testimony or the records admitted pursuant to such testimony.[2]

II. IMPORTANT QUESTIONS ARE PRESENTED BY THE DECISION BELOW THAT, EVEN IF THE JUSTICE DEPARTMENT SUBMITTED KNOWING OR RECKLESS FALSEHOODS ABOUT A CITIZEN IN A REQUEST FOR INVESTIGATIVE ASSISTANCE UNDER AN INTERNATIONAL TREATY, THIS DOES NOT GIVE RISE TO CLAIMS UNDER THE FOURTH AND FIFTH AMENDMENTS SUFFICIENTLY COLORABLE TO ENTITLE THAT CITIZEN TO DISCOVER THE TREATY REQUEST.

The government attempts to mask over the enormity of the error committed by the Court of Appeals in deciding whether the secret charges that petitioner was involved in organized crime were true. Gov't Br. at 25. For what happened below is conceptually no different than this: In 1981, a secret indictment is returned charging petitioner with being knowingly involved in important criminal activities of an organized criminal group. Thereafter, he is never permitted to see the charge, let alone defend against it. Ten years later, a panel of appellate judges – who were not witnesses to and had no personal knowledge of the events in question, and who did not even have an evidentiary record before them – pronounce that the charges are true and petitioner is guilty. This is the essence of what the Court of Appeals did in this case.

By relying on Article 37 of the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Swiss Confederation, 27 U.S.T. 2019, T.I.A.S. 8302, the government

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[2] The government further states that, "[t]o the extent petitioners wished to challenge the authentications, moreover, they were free to do so during the Swiss depositions of record custodians." Gov't Br. at 24. The problem with this assertion is that none of the affiants who signed the twelve certificates of authenticity, nor the individual who was interviewed, were among the four witnesses deposed in Switzerland. Petitioner could hardly have cross-examined the deposed witnesses about statements contained in affidavits they did not sign.

also mischaracterizes the nature of petitioner's claims. Gov't Br. at 25. Article 37 has no application to this case, because the issues raised by petitioner do not have their source in the Mutual Assistance Treaty, but in the Constitution. As the court in *Cardenas v. Smith*, 733 F.2d 909, 917-19 (D.C. Cir. 1984) expressly held, Article 37 does not stand as a bar to constitutional claims, but, rather, is limited to claims arising under the Treaty.[3] Here, as argued in his opening brief, petitioner's claims are rooted in the Fourth and Fifth Amendments to the Constitution, not the Mutual Assistance Treaty.

III. IMPORTANT QUESTIONS ARE PRESENTED BY THE DECISION OF THE COURT BELOW APPROVING THE USE OF THE SWISS DEPOSITION SUMMARIES.

While on page 18 of its brief the government responds to petitioner David Sturman's claims that District Attorney Holdener's bias tainted the Swiss deposition proceedings, the government entirely ignores petitioner Reuben Sturman's claims that his rights to due process and a fair trial were denied when the Swiss depositions were presided over by Holdener. Gov't Br. at 18. This oversight is particularly curious since it is petitioner Reuben Sturman who is in the strongest position of all to challenge the entire Swiss proceedings. For it was *petitioner* who District Attorney Holdener caused to be unlawfully arrested on an unfounded suspicion of a violation of Swiss law; it was *petitioner* who was interrogated by the District Attorney, who ultimately had to release petitioner with a begrudging apology; and it was *petitioner* who was the focal point of the District Attorney's involvement in the investigation and prosecution of this very case. The Swiss prosecutor who presided over the depositions had demonstrated bias against petitioner Reuben Sturman, and yet the government makes no effort to address his claims. These

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[3] The government cites to *Cardenas* as though it supports the government's position in this case, but any fair reading of that case proves otherwise.

facts present serious questions concerning Rule 15, Fed. R. Crim. P., due process and fundamental fairness, deserving of this Court's attention.

IV. THE COURT OF APPEALS HAS EFFECTIVELY REENACTED A SUBJECTIVE STANDARD FOR RECUSAL OF FEDERAL JUDGES IN DIRECT CONTRAVENTION OF 28 U.S.C. § 455 AND THIS COURT'S PRECEDENTS.

Contrary to the government's claim that there is no merit to petitioner's argument that the Court of Appeals failed to apply an objective standard, as required by 28 U.S.C. § 455, *see* Gov't Br. at 26, there are numerous factors which demonstrate that that is precisely what the court did. The Court of Appeals, for instance, accepted the trial judge's assertion that he had tried to set his feelings aside, which is a wholly inappropriate consideration under the objective standard created by § 455. Moreover, the Court of Appeals would have had petitioner prove, in the form of reversible error on appeal, that he had suffered actual prejudice directly attributable to the judge's bias. Pet. Cert. at A.25a. Again, § 455, by its plain language, does not place such an onerous burden on petitioner. Further, the court noted that it found no fault with the judge's sentence, another wholly irrelevant consideration under § 455.

Not only did the Court of Appeals impose an inapplicable and onerous burden on petitioner to demonstrate actual bias which took the form of reversible error on appeal, but the Court of Appeals completely ignored the fact, brought to its attention by petitioner, that the trial judge's first act in this case amounted to reversible error: imposing a $3,000,000 cash bond which the judge refused to lower upon petitioner's motion, but which was lowered by a different panel of the Court of Appeals to $100,000 in an opinion criticizing the trial court for imposing such a bond *ex parte*.

V. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A CHARGE OF FILING A FALSE TAX RETURN UNDER 26 U.S.C. § 7206(1) IS A LESSER-INCLUDED OFFENSE OF A CHARGE OF ATTEMPTED TAX EVASION BY FILING A FALSE RETURN UNDER 26 U.S.C. § 7201.

Five Circuit Courts of Appeals have held, *without qualification*, that the crime of filing a false tax return under 26 U.S.C. § 7206(1) is a lesser-included offense of attempted tax evasion under 26 U.S.C. § 7201, where the affirmative act of evasion charged is the filing of a false tax return. *United States v. Kaiser*, 893 F.2d 1300, 1305-07 (11th Cir. 1990); *United States v. Citron*, 783 F.2d 307, 312 (2d Cir. 1986), *following remand*, 853 F.2d 1055 (2d Cir. 1988); *United States v. White*, 417 F.2d 89, 93-94 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976); *United States v. Lodwick*, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969); *Gaunt v. United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951). This is because proof of attempted tax evasion which is premised upon the filing of a fraudulent return necessarily proves that the defendant filed a fraudulent return. Further without qualification, those courts have held that imposing consecutive punishment for such crimes accordingly would be unconstitutional.

Two Courts of Appeals have held, however, that this is not always so, notwithstanding the fact that proof of attempted tax evasion on such a theory necessarily proves the filing of a fraudulent return. Rather, those courts have held that consecutive sentences can be imposed so long as more than one falsehood is contained in the tax return. *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991); *United States v. Franks*, 723 F.2d 1482, 1486 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). This is not a mere distinction, as the government suggests, but an absolute conflict. For, no matter how many falsehoods are contained in any given tax return, § 7206(1) can only be violated once in any given tax

year and proof that the accused evaded taxes by the filing of a false return will always prove that lesser offense.

VI. THIS IS AN IDEAL CASE TO CONSIDER THE ISSUE RESERVED BY THIS COURT NEARLY TWENTY YEARS AGO IN *CALIFORNIA BANKERS ASSOCIATION V. SHULTZ,* 416 U.S. 21 (1974): WHETHER PROVISIONS OF THE BANK SECRECY ACT AND REGULATIONS PROMULGATED THEREUNDER, ARE UNCONSTITUTIONAL UNDER THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT.

The government, in attempting to make short shrift of this issue, completely ignores the fact that this Court reserved this specific issue in *California Bankers Association v. Shultz,* 416 U.S. 21 (1974); indeed, the government does not even cite to *California Bankers.* Moreover, the government makes no reference to the specific facts of this case – that is, a pending grand jury investigation of petitioner concerning the precise information required to be disclosed by the Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.* – which render this case a particularly appropriate vehicle for this Court finally to resolve the issue reserved in *California Bankers.*

VII. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE "DEFRAUD CLAUSE" OF 18 U.S.C. § 371 MAY BE USED TO PROSECUTE AN AGREEMENT TO ENGAGE IN CONDUCT WHICH CONGRESS HAS DETERMINED IS NOT CRIMINAL.

The government, like the two courts below, again refuses to address the real issue presented by this case: Did Congress, when it amended 26 U.S.C. § 7206(4) in 1954 to make post-assessment concealment of assets, income and sources of income a crime, decide that the preassessment concealment of assets, income and sources of income is not a crime? If so, the question presented by this case is whether the preassessment concealment of assets, income and sources of income (which

is all that Count I charged in this case) can be prosecuted as a crime under the defraud clause of 18 U.S.C. § 371.

CONCLUSION

For all the reasons set forth above, this Court should grant petitioner's request for a writ of certiorari and accept this case for review.

Respectfully submitted,

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